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No. 96-939

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, SOUTHEAST PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A. and Southeast Bank of West Florida;

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY MEMORANDUM

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

The petitioners agree with the respondents' position that it is appropriate to grant the petition, vacate the judgment of the court of appeals, and remand this case for further consideration in light of *Atherton v. FDIC*, 117 S.Ct. 666 (1977). Nonetheless, the petitioners strongly disagree with the import of the FDIC's newly-minted position before the Court, which only partially concedes that FIRREA[1] has supplanted the *D'Oench*[2] doctrine. The FDIC joins its shift in stance to posturing that its development of a new administrative policy regarding FIRREA's application, published on February 4, 1997, has nothing to do with *Atherton*. The FDIC also opines that, regardless of its merits, this case is "an inappropriate vehicle for decision," because "substantial assets remaining in the receivership"[3] *now* apparently will fund the petitioners' claims.

In adopting FIRREA in 1989, Congress created 12 U.S.C. § 1821(d)(9)(A)—a provision that barred claims against the FDIC as receiver that were based upon pre-receivership agreements, unless those claims met the amended requirements of 12 U.S.C. § 1823(e)(1). The FDIC now concedes that FIRREA preempts the *D'Oench* doctrine. It urges, however, through a February 4 policy statement, that FIRREA's preemption does not apply to proceedings where the receiver was appointed after

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[1] *I.e.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

[2] *I.e.*, *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)

[3] Brief for the FDIC, p.6.

FIRREA's effective date, unless the agreements were entered *before* FIRREA's effective date. The FDIC's effort to salvage remnants of *D'Oench* is at direct odds with the law in two circuits that have looked to the date of *receivership* to determine the applicability of FIRREA. *See, e.g., FDIC v. Barton*, 96 F.3d 128 (CA5 1996) (To determine FIRREA's applicability, "courts must look to the law in effect at the time of appointment."); *accord FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225 (CA10 1993).

The FDIC cites *Oklahoma Radio Associates. v. FDIC*, 987 F.2d 685, 695-96 (CA10 1993), *motion to vacate denied*, 3 F.3d 1436 (1993); and *Murphy v. FDIC*, 38 F.3d 1490, 1501 (CA9 1994) (*en banc*), to argue that "the courts that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the *transactions* at issue occurred before FIRREA's enactment." (Brief for the FDIC, App., p. 6a n.3 (emphasis added)). Neither case holds that the date of receivership is not the correct date to determine FIRREA's applicability. In both cases, the receivership had begun before FIRREA. In *Murphy*, the FDIC had *conceded* that FIRREA did not apply. In *Oklahoma Radio*, the court cited legislative history indicating that FIRREA was not to apply to pre-existing *receiverships*[4] and rejected the FDIC's argument that

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[4] Shortly before passage of the bill, Rep. Ortiz made the following comments:

> Mr. Speaker, I seek to clarify the intent and effect of the prospective application of the proposed bill. I understand that this bill would redefine and augment the powers of the Federal Deposit Insurance Corporation when that Corporation serves as a receiver for a failed financial institution. The powers set forth in this bill are, in many respects, new, and there is no intent that such powers be applied to receiverships that have been established prior to the enactment of this bill.

(continued ...)

FIRREA should apply to the appeal, which was pending at FIRREA's effective date. The FDIC's reliance on these decisions to support its contentions highlights the absence of a foundation for its February 4 policy statement. Unfortunately, this dearth of support for its policy may also signal the FDIC's disregard for the law as it stands today, by force of several decisions of the courts of appeals.

The petitioners also dispute the FDIC's argument that (i) section 1823(e)'s limitation to agreements that "tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it," is not a limitation on section 1821(d)(9)(A)'s ambit; and (ii) "[n]evertheless. . . the FDIC, as a matter of [discretionary] policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of section 1823(e)." (Brief for the FDIC, App., p. 6a). Section 1823(e)(1) *defines* the contours of section 1821(d)(9)(A), and the "asset" restrictions on section 1823(e)(1) do restrict 1821(d)(9)(A). *See* Pet. 11 n.10 (citing *Langley v. FDIC*, 484 U.S. 86, 93 (1987), and *Murphy v. FDIC*, 61 F.3d 34, 38 (CA D.C. 1995)). The FDIC has no discretion to bar claims under section 1821(d)(9)(a) that fall outside of section 1823(e).

The courts of appeals have confirmed that FIRREA's plain terms do not extend it to ordinary, non-banking transactions. *John v. RTC*, 39 F.3d 773, 776 (CA7 1994); *Thigpen v. Sparks*, 983 F.2d 644, 647 (CA5 1993). *But see* Brief for the FDIC, App., p. 5a n.2 (appended policy statement attempting to distinguish *John* and *Thigpen* on basis that FIRREA should not have been applied under FDIC's proposed retroactivity analysis). One of the critical reasons why *D'Oench*'s judicial expansion does not comport with FIRREA is because courts have applied *D'Oench* outside the context of banking transactions. This is another reason why FIRREA has

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(... continued)
987 F.2d at 696 n.7 (quoting 135 Cong. Rec. H5003 (daily ed. August 1, 1989)).

preempted the *D'Oench* doctrine in the wake of *Atherton's* explanation. *But see* Brief for the FDIC, App., p. 5a (policy statement citing pre-FIRREA *Langley* decision for proposition that FIRREA cannot be construed more narrowly than *D'Oench*). The FDIC's policy statement simply misses the mark, and the point of *Atherton*; the FDIC is trying to stamp its executive fiat on an amalgamation of FIRREA and *D'Oench*. At best, its statement reflects a selective obfuscation of case precedents, rather than a sincere recognition of the accurate import of the existing law.

It is small wonder that petitioners should find little solace in the FDIC's long delayed admission that the funds in its coffers "likely" belong to the petitioners. Its statement reflects a stubborn determination to dispute this matter to unjustified lengths, despite this halfhearted concession.

The Court may be inclined to avoid the certain waste of judicial resources the FDIC's new positions invite, and resolve the scope of FIRREA's impact on *D'Oench*. Alternatively, the Court may grant the petition, vacate the judgment below, and remand for further consideration in light of *Atherton*.

Respectfully submitted,

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